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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ULRICK K. WHITE,

Defendant and Appellant.

2d Crim. No. B209459
(Super. Ct. No. 2003034297)
(Ventura County)

Ulrick K. White was convicted, after trial by jury, of forcible rape (Pen. Code, § 261, subd. (a)(2)) and false imprisonment (*id.*, § 236). On his prior appeal, we affirmed White's conviction, but we vacated his sentence and remanded for resentencing. We said that in imposing the upper term sentence for rape the trial court did not comply with the sentencing procedures set forth in *Cunningham v. California* (2007) 549 U.S. 270.

On remand, at the resentencing hearing, the trial court imposed the upper term of eight years for rape. White has appealed and claims the sentence is unauthorized. We conclude that the upper term sentence does not contravene ex post facto or due process constitutional standards. We affirm.

FACTS

Nancy C. went to the Bombay bar in Ventura, consumed alcoholic beverages and became intoxicated. She started to dance by herself.

White, who was also dancing, approached her and briefly talked with her. Later, Nancy left the bar by herself and walked out to the street. White drove by in a minivan and offered her a ride.

Nancy entered the van. She wanted White to drive her home. She became uneasy when White told her, "We will just hang out and I'll drive you home afterwards." She asked him several times to let her out of the vehicle, but he told her to "shut up."

Nancy tried to jump out of the van, but White grabbed her arm and prevented her from leaving.

White drove her to a dark, secluded area and stopped the vehicle. He choked her, pulled off her shorts and raped her.

DISCUSSION

I. Validity of the Upper Term Sentence

White contends the trial court erred by imposing an upper term sentence for rape because it relied on "reformed sentencing rules" which did not exist at the time he committed his offense. He claims that in imposing the upper term sentence the trial court contravened due process and ex post facto constitutional standards. We disagree.

In *Cunningham v. California, supra*, 549 U.S. at page 293, the United States Supreme Court noted that under California sentencing law the middle term was the presumptive statutory maximum sentence. It held that, subject to a few exceptions, a trial judge could not impose an upper term sentence based on aggravating facts that were not found by a jury. But the court also noted that California could change its sentencing procedures to comply with the Sixth Amendment by allowing trial judges "to exercise broad discretion . . . within a statutory range." (*Id.* at p. 294.)

Subsequently our Supreme Court in *People v. Sandoval* (2007) 41 Cal.4th 825, 846, held that it had the "authority to fashion a constitutional procedure for resentencing in cases in which *Cunningham* requires a reversal of an upper term sentence."

Relying on those *Sandoval* procedures, in our prior opinion vacating White's first sentence, we stated that on remand the trial court had discretion to impose "a lower, middle or upper term." (*People v. White* (Jan. 17, 2008, B189111) [nonpub. opn.].)

White contends that the discretion given to trial judges to impose more than a midterm sentence is based on *Sandoval's* "reformed sentencing rules" which were adopted after he committed the offense. He argues that consequently ex post facto and due process constitutional principles precluded the trial judge from imposing the upper term sentence.

But our Supreme Court has rejected these contentions, and White's challenges to the sentencing procedures our Supreme Court developed for cases involving *Cunningham* reversals are without merit. (*People v. Sandoval, supra*, 41 Cal.4th at pp. 836, 846, 855-857.) In *Sandoval*, the court held that "the federal Constitution does not prohibit the application of the revised sentencing process . . . to defendants whose crimes were committed prior to the date of our decision" (*Id.* at p. 857.) It determined that on cases remanded for resentencing on *Cunningham* issues, trial courts have discretion to decide whether to impose a lower, middle or upper term. (*Id.* at p. 832.) Consequently the trial court here was not confined to imposing the midterm sentence for rape. (*Ibid.*)

Our Supreme Court also held that imposing these new sentencing procedures to older cases does not violate due process. It noted that under the sentencing rules, which existed long before *Cunningham*, defendants were on notice that they were potentially subject to upper term sentences. It held, "That notice satisfies the requirements of due process." (*People v. Sandoval, supra*, 41 Cal.4th at p. 857.)

White claims the court erred. But we are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Kevin J. McGee, Judge

Superior Court County of Ventura

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